PROPERTY LAW: 1995-1996

VOLUME ONE

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CHAPTER ONE

PROPERTY IS RIGHTS NOT THINGS

INTRODUCTION

These materials are designed to achieve two principal purposes. First, most of the chapters deal with the basic principles of the common law of real property (land law). In this area they deal both with traditional common law "ownership" and rights less than ownership (including easehold relationships), and with common law aboriginal title. Second, principally in the first two chapters, the materials examine the nature of property. They ask what the word "property" means to a lawyer, and examine how the courts deal with claims that things not previously considered to be "property" should be made so.

While in one sense these two purposes are distinct (land is obviously property in common law societies) in another sense they are intimately related. This is because while land is "property", we will see that the rights of owners are contested matters. Thus your study of the rules regulating the uses of real property should be carried out against the background of the more general and theoretical material dealt with in the first two chapters.

The first proposition we will examine is contained in the title to this chapter - "property is rights not things". For lawyers, the word "property" refers to that set of rules which govern "the relations among people regarding the control, use and transfer of valued resources": Singer, Property Law, p. xxxvii. It is useful to break down this definition into its constituent parts, and expand briefly on each:

(a) Property is a "set of rules". Lawyers are interested not in the "things", the resources which are the objects of property law, but in the rules which govern how those resources are to be used.

(b) Property rules govern "relations among people". Property rules allocate rights in things to and among people. These property entitlements are never absolute. The rules vary depending on the thing being regulated, the type of entitlement (see "c" below), and the relationship involved.

(c) Property rules govern "control, use and transfer". Property rules therefore deal with various kinds of entitlements. Principally they involve rights to use (and limits on those rights), rights to exclude others from using, and rights to transfer .

(d) Property rules concern "valued resources". But this is somewhat tautological, because for the most part a resource is not valued until property rules are applied to it. But that is the point property law concerns itself with which things should be the subject of property.

One further general point, not expressly included in the definition above, should be added here. In addition to not being absolute, property rules are not static. They vary according to time, place, and context. They therefore represent one way of responding to social conflict

THE CATEGORISATION OF PROPERTY IN THE COMMON LAW

The principal traditional distinction in the common law of property is that between REAL PROPERTY (land) and PERSONAL PROPERTY (all other forms of property). This is actually a distinction which derives from medieval forms of civil procedure - different actions were available to sue in relation to land than were available for all other actions. Whatever its origins, this distinction still governs the way in which property is categorised in the common law. Note the use of the word "traditional" in the first sentence. The real-personal distinction does not include aboriginal rights to land, and it is unclear where these should go. They might be seen as a third principal category under real property - they are certainly not corporeal or incorporeal hereditaments. It is more likely that they should be seen as unique interests, adding a third general category to the real-personal distinction.

Personal property is usually sub-divided into the categories of choses in possession and choses in action, which translates as tangibles and intangibles. "Intangibles" means such "things" as copyright, trademarks, patents, stocks, bonds, corporate shares, a right to enforce a debt, a claim to pension payments in the future, even though some of them have tangible manifestations - a share certificate, for example. In Canada a bank note is a sui generis entity, not categorised as either a chose in possession or a chose in action.

CHAPTER TWO

WHICH RIGHTS IN WHICH THINGS?

INTRODUCTION

This chapter is about novel claims for property rights. That is, the cases involve courts deciding whether to award property rights in certain things to certain individuals. Some involve claims to a substantial bundle of rights, others to a more limited number of strands. In some the contest is essentially between private claimants, in others the thing in question will either be subjected to a private property regime or a common property one. These cases reveal that Macpherson is correct to suggest that "property" is a changing concept. In reading them, and the discussions of theories of property below, it might also be useful to bear in mind, even if you do not agree with it, Macpherson's further assertion that the concept of property is a "purposeful" one, that its meaning alters over time because of changing conceptions about how social interests may best be served.

In a part of his "Introduction" not reproduced in chapter one, Macpherson also tells us that although property is an enforceable claim to the use or benefit of something, property rights do not rest on force or the threat of force alone. He points out that all societies provide ethical justifications for private property. He states: "Property is controversial ... because it subserves some more general purposes of a whole society, or the dominant classes of a society and these purposes change over time: as they change, controversy springs up about what the institution of property is doing and what it ought to be doing. [Thus] ... the institution ... of property is always thought to need justification by some more basic human or social purpose. The reason for this is implicit in two facts we have already seen about the nature of property: first, that property is a right in the sense of an enforceable claim; second, that while its enforceability is what makes it a legal right the enforceability itself depends on a society's belief that it is a moral right. Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right. This is simply another way of saying that any institution of property requires a justifying theory. The legal right must be grounded in a public belief that it is morally right. Property has always to be justified by something more basic; if it is not so justified, it does not for long remain an enforceable claim. If it is not justified, it does not remain property."

where news collected by it is gainfully used without permission. If a legislature concluded ... that under certain circumstances news-gathering is a business affected with a public interest, it might declare that, in such cases, news should be protected against appropriation, only if the gatherer assumed the obligation of supplying it, at reasonable rates and without discrimination, to all papers which applied therefor. If legislators reached that conclusion, they would probably go further, and prescribe the conditions under which and the extent to which the protection should be afforded; and they might also provide the administrative machinery necessary for ensuring to the public, the press, and the news agencies, full enjoyment of the rights so conferred.

Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear.

NOTES

1) For an application of INS v. AP in more highbrow circumstances see Metropolitan Opera Association v. Wagner-Nichols Recording Corp. (1950) 101 N.Y.S. (2d) 483 (N.Y. Supreme Court).

2) In Pittsburgh Athletic Co. et al v. KOY Broadcasting Co. (1930), 24 F. Supp. 490 (U.S. Dist. Ct., Penn) the Pittsburgh Pirates obtained an injunction to prevent the defendants from making unauthorized broadcasts of their games from nearby leased premises which overlooked the stadium. The Pirates had given exclusive broadcasting rights to two other radio stations, rights which Schoonmaker J. described as property. He said at p. 492 that KQY's action:

"amounts to unfair competition and is a violation of the property rights of the plaintiffs. For it is our opinion that the Pittsburgh Athletic Company by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news and the right to control the use thereof for a reasonable time following the games."

3) In Canadian Admiral Corporation Ltd. v. Rediffusion Inc., [1954] Exch. 382 the defendant cable company intercepted C.B.C. transmissions of Montreal Alouette games and broadcast them to its subscribers. The court held that "no matter how piratical, the taking by one person of the work of another may be, such taking cannot be an infringement of the rights of the latter unless copyright exists in the work." It then held that such copyright did exist under the provisions of the Copyright Act.

4) One commentator, while noting that the misappropriation doctrine enunciated in INS v. AP has had limited application, nonetheless approves of this decision as one dealing with "certain types of services of a fragile character, rather than products, whose commercial exploitation without destruction by immediate imitation is difficult": J.A. Rahl, "The Right to 'Appropriate' Trade Values" (1962) 23 Ohio State L. J. 56 at 57. Rahl argues that the misappropriation doctrine should not be employed against competition generally, but only against competition "where the result would be to destroy either the value created by plaintiff or the market for it". That is, "the protection ...[should] safeguard the plaintiff's opportunity to market his trade value" at all; it should not protect opportunities to increase profitability. He states: "the court's protection ... [should be] reserved for situations in which defendant's conduct threatens to destroy the opportunity to market the trade value, the prospect of which has induced plaintiff to bring it forth" (p. 63).

5) In two cases involving the Boston Marathon the Boston Athletic Association (BAA) sought to invoke the misappropriation principle. Boston Athletic Association v. Sullivan 867 F.2d 22 (lst Cir, 1989) concerned a company selling t-shirts with "Boston Marathon" written on them. The BAA was successful in enjoining this. In WCVB-TV v. Boston Athletic Association 926 F.2d 42 (lst Cir, 1991) the BAA had sold "exclusive" TV rights to one local TV station, but another one planned to broadcast the marathon simply by setting up cameras on the streets. The BAA failed in an attempt to obtain an injunction to prevent this. In the course of its decision the court stated:

"As a general matter, the law sometimes protects investors from the 'free riding' of others; and sometimes it does not. The law, for example, gives inventors a 'property right' in certain inventions for a limited period of time; ... it provides copyright protection for authors; ... it offers certain protections to trade secrets.... But, the man who clears a swamp, the developer of a neighbourhood, the academic scientist, the school teacher, and millions of others, each day create 'value' (over and above what they are paid) that the law permits others to receive without charge. Just how, when and where the law should protect investments in 'intangible' benefits or goods is a matter that legislators typically debate, embodying the results in specific statutes, or that common law courts, carefully weighing relevant competing interests, gradually work out over time". [emphasis in original]

What distinguishes the two Boston Marathon cases? What distinguishes the latter Boston Marathon case from the case cited above involving the Pittsburgh Pirates?

NOTES

1) Despite its conclusion on whether the licence was property, the court in Caratun employed the support provisions of the federal Divorce Act to award Mrs Caratun a lump sum payment of $30,000. This decision was refused leave to appeal by the Supreme Court of Canada: (1993), 46 R.F.L. (3d) 314 (S.C.C.).

2) Most Canadian decisions, and commentators, have come to the same conclusion as the Ontario Court of Appeal on this issue. For a review see N. Bala, "Recognizing Spousal Contributions to the Acquisition of Degrees, Licences and Other Career Assets: Towards Compensatory Support", (1989) 8 Canadian Journal of Family Law 23.

3) A dental practice is considered to be property for the purposes of the FLA in Ontario, and its value is usually calculated as assets plus goodwill minus liabilities. Is this inconsistent with the holding in Caratun? Pension entitlements, which will be paid in the future, are also considered to be property; is that inconsistent?

4) Professor Margaret McCallum has written: "If the essence of property is the right to exclude others from access to the benefits of ownership, then the right to practise dentistry is surely property. It is something of value to Mr. Caratun, and something which can be used to produce value"; see "Caratun v. Caratun: It Seems that We Are Not All Realists Yet", unpublished, 1994, forthcoming in Canadian Journal of Women and the Law. Do you agree?

STEWART V. THE QUEEN (1988), 50 D.L.R. (4th) 1 (S.C.C.)

The judgment of the court was delivered by LAMER J.: While one can steal a document containing confidential information, does obtaining without authorization the confidential information, by copying the document or memorizing its content, constitute theft? Is it fraud? The appellant was charged in the Supreme Court of Ontario with the following three counts....

"That he, during the month of October, 1981 at the Municipality of Metropolitan Toronto in the Judicial District of York, unlawfully did counsel Jan William Hart to commit the indictable offense of theft, an offense as described in Section 294 of the Criminal Code of Canada, to wit: to steal information the property of the Constellation Hotel and its employees, of a value exceeding $200.00 contrary to Section 422 of the Criminal Code of Canada."

The events giving rise to these charges can be summarized succinctly. A union attempting to organize the approximately 600 employees of the Constellation Hotel, in Toronto, was unable to obtain the names, addresses and telephone numbers of the employees because of a hotel policy that such information be treated as confidential. The employer also barred union representatives from the premises. The appellant, Wayne John Stewart, a self-employed consultant, was hired by somebody he assumed to be acting for the union to obtain the names and addresses of the employees. Stewart offered a security guard at the hotel a fee to obtain this

NOTES

1. For a decision of the United States Supreme Court going the other way see Carpenter et al v. U.S., 108 S.Ct. 316 (1987).

2. For a comment on the Stewart case which discusses also the other cases we have looked at, see A. Weinrib, "Information and Property", (1988) 38 University of Toronto Law Journal 117. See also D. Doherty, "When is a Thief Not a Thief? When he Steals the Candy but Leaves the Wrapper", (1988) 63 C.R. (3d) 322. Both authors disagree with the Supreme Court's ruling. Doherty writes that the result "seems ludicrous" because criminal liability is made to depend "on whether [Stewart] ... took the package (a worthless item) along with the contents (a valuable item)". He further argues that "a consideration of the language of s.283 of the Criminal Code ..., along with the applicable policy considerations, yields the conclusion dictated by common sense: Mr. Stewart should have been convicted".

3. In R. v. MacEwen; R. v. Bell [1947] 2 D.L.R. 62 (P.E.I.S.C.) the accused were charged with theft of alcohol. The Prohibition Act, R.S.P.E.I. 1937, c. 27, s.88 provided:

88. No property rights of any kind shall exist in liquors unlawfully kept at any place in this Province, or in the vessels of receptacles containing the same, and in all such cases the liquors and the vessels and receptacles in which such liquors are contained, may be seized and may be ordered, by the Court or Magistrate having jurisdiction in the place where the offence was committed, to be destroyed or otherwise disposed of, such order to be made on the application of the Attorney General or counsel acting for the Crown.

In addressing the Grand Jury as to whether they could bring in a true bill of indictment, Campbell C.J. P.E.I. said:

"The law regarding theft is part of our criminal law, and criminal law is a subject under the exclusive jurisdiction of the Parliament of Canada; but the criminal law of theft only goes to the extent of defining the offence. The offence is defined in general as being the taking of particular commodities or goods so as to deprive the owner, or some person having a special interest, of the possession or enjoyment of those goods. In other words, theft is an interference with property rights, whether absolute or limited....In order for goods to be stolen they must be the subject of property right or special interest, and the criminal law does not define what property rights are. The existence or attribute of property rights remains the subject of provincial jurisdiction....Under the Prohibition Act alcoholic intoxicating liquor, including essences, cannot be the subject of property, in whoever's possession they are, and therefore they cannot be the subject of theft.... [T]he bottles are in the same position as the essence. No matter how valuable the bottles containing the illicit liquor might be, no one has ownership of them. To summarize as to the question of theft, I don't see how a charge of theft can be made as to the essences or as to the bottles in which they are contained".

4. In R. v. Roberts (1991), 49 O.A.C. 134 (C.A.) a policeman was convicted of theft for taking the carcass of a deer killed by a motorist. The driver had called the police and asked a friend, Hueser, to collect the carcass. Hueser got there first and loaded it onto his truck. The policeman then arrived and took the carcass, eventually giving it to his girlfriend's father. Roberts appealed his theft conviction on the ground that "Mr. Hueser had no proprietary interest in the carcass of an animal ferae naturae [not domesticated] killed on a highway". In dismissing the appeal Lacourciere J.A. made two points. First:

"The prima facie presumption of law is that the person who has de facto possession has the property, and accordingly such possession is protected, whatever its origin, against all who cannot prove a superior title. This rule applies equally in criminal and civil matters. Thus a person in actual or apparent possession, but without the right to possession, has, as against a stranger or a wrongdoer, all the rights and remedies of a person entitled to and able to prove a present right to possession."

Second: "The provisions of the Game and Fish Act, R.S.0. 1980, c. 182 and the regulations thereunder are relevant with respect to this ground of appeal. The appellant argued that the driver of the vehicle or Mr. Hueser as agent did not acquire any property or interest in the carcass. However, we are satisfied that s. 31 of the Game and Fish Act and its regulations recognize the beneficial interest of a person who "acquires" an animal suitable for food. The carcass of a wild animal which has been reduced to possession is a "thing" within the meaning of s. 322 of the Criminal Code and can be the subject of theft."

PROBLEMS

From the cases read so far, what arguments would you make that the following should be recognized as property? Should such recognition be restricted to certain contexts only?

1. The papers of Richard Nixon seized by Congress as part of the Watergate investigation? In 1992 an American court held that Nixon owned all such material and that he must be compensated for their seizure.

2. Your spleen following its removal in an operation? See Moore v. Regents of the University of California, 249 Cal. Rptr. 494 (1988, Court of Appeals).

3. A license to operate a taxi-cab? See Re Foster (1992), 89 D.L.R. (4th) 555 (Ont. G.D.)

4. The right to produce a certain quota of milk under a government marketing scheme? See Ackerman v. Attorney-General of Nova Scotia et al (1988), 47 D.L.R. (4th) 681 (N.S.S.C.-T.D.), and V. (G.G.) v. V. (J) (1992), 98 D.L.R. (4th) 265 B.C.C.A.). Or tobacco? See Re National Trust Co. v. Bouckuyt (1987), 43 D.L.R. (4th) 543 (Ont. C.A.). In these licence/quota cases, would the context make a difference?

CHAPTER THREE

INTRODUCTION TO THE COMMON LAW OF REAL PROPERTY

THE DOCTRINES OF TENURE AND ESTATES

A) INTRODUCTION TO TENURE AND ESTATES

Although much of the system of tenure explained below is obsolete, a basic understanding of the historical origins of the English law of real property is indispensable to an understanding of the conceptual bases of that law in common law Canada. As in England, land "owners" in Canada are still not true owners, but are tenants in fee simple of the crown.

K. Gray, Elements of Land Law

It is not easy to imagine, tabula rasa, how best to construct a coherent and systematic body of rules governing rights in and over land. During the course of eight centuries, English law has developed a framework of rules which functions today with admirable success, but it is far from obvious that, if the task of construction were begun again, the end result would necessarily resemble the law of real property in its present form. The conceptual points of departure which lie at the back of the law of real property contain little, if anything, of a particularly compelling or a priori nature. There is indeed nothing inevitable about the eventual shape of modern land law, but it remains true that the law of today is still heavily impressed with the form of ancient legal and intellectual constructs .... From its earliest origins land law has comprised a highly artificial field of concepts, defined with meticulous precision, with the result that the inter-relation of these concepts is not unlike a form of mathematical calculus. The intellectual constructs of land law move, as Professor Lawson once said, 'in a world of pure ideas from which everything physical or material is entirely excluded'. The law of land is logical and highly ordered, consisting almost wholly of systematic abstractions which 'seem to move among themselves according to the rules of a game which exists for its own purposes.' It is from this interplay of naked concepts that the creature of modern land law ultimately derives. English law cannot be properly understood except in the light of its history, and it is in the doctrines relating to tenures and estates that the historical roots of English land law are to be found.

The Doctrine of Tenures

The origin of the medieval theory of English land law was the Norman invasion of England in 1066. From this point onwards the King considered himself to be the owner of all land in England. Since the Normans brought with them no written law of land, they initiated in their newly conquered territory what was effectively a system of landholding in return for the performance of services. According to this feudal theory, all land was owned by the Crown and was granted to subjects of the Crown only upon the continued fulfillment of certain conditions. Land was never granted by way of an actual transfer of ownership, and the notion of absolute ownership other than in the Crown was therefore inconceivable. Pollock and Maitland were later to explain quite simply that all land in England 'must be held of the king of England, otherwise he would not be the king of all England'. In their view, to have wished in medieval times for an ownership of land which was not subject to royal rights was 'to wish for the state of nature'.

different intention altogether.

Even if the clause could be read as though it merely provided for a forfeiture in the event of the daughter being married to a man not of the Jewish faith, I am of opinion that it would still be void for uncertainty. For how is it to be ascertained whether a man is of the Jewish faith? The Court of Appeal answered this question by saying that whether a man was or was not of the Jewish faith was a mere question of fact to be determined on evidence, and that the assertion by the man that he was of that faith was well nigh conclusive. I should agree entirely with the Court of Appeal as to this if only I knew what was the meaning of the words "of the Jewish faith." Until I know that I do not know to what the evidence is to be directed. There are, of course, an enormous number of people who accept every tenet of, and observe every rule of practice and conduct prescribed by, the Jewish religion. As to them there can be no doubt that they are of the Jewish faith, but there must obviously be others who do not accept all those tenets and are lax in the observance of some of those rules of practice and of conduct, and the extent to which the tenets are accepted and the rules are observed will vary in different individuals. I do not doubt that each of these last mentioned individuals, if questioned, would say, and say in all honesty, that he was of the Jewish faith. On the other hand, I do not doubt that one who accepted all the tenets and observed all the rules would assert that some of the individuals I have mentioned were certainly not of the Jewish faith. It would surely depend on the extent to which the particular individual accepted the tenets and observed the rules. I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree. The testator has, however, failed to give any indication what degree of faith in the daughter's husband will avoid, and what degree will bring about, a forfeiture of her interest in his estate. In these circumstances the condition requiring that a husband shall be of the Jewish faith would, even if standing alone, be void for uncertainty. I would allow this appeal.

NOTES AND PROBLEMS

1) In Re Down (1968), 2 O.R. 16 (C.A.) the testator's will provided in part:

When my said son, Harold Russell Down, arrives at the age of thirty years, providing he stays on the farm, then I give, devise and bequeath all of my estate both real and personal of every nature and kind whatsoever and wherever situate unto my said sons Stanley Linton Down and Harold Russell Down to be divided between them equally share and share alike.

Harold Down, 26 years old and not farming, applied for construction of the will in order to ascertain his rights to his father's estate. The trial judge held that the will created a condition precedent not void for uncertainty. Harold Down appealed, arguing that he had a contingent interest which would vest when he reached 30, attached to which was a condition subsequent which was void for uncertainty.

Do you think the appeal should succeed?

2) In Blathwayt v. Lord Cawley and Others, [1975] 3 All E.R. 625 (H.L.) the court considered the validity of a condition which prohibited future heirs of the testator (maker of a will) from inheriting, or divested the estate once inherited, if any of them should "Be or become a Roman Catholic". Following Clayton v. Ramsden, is this uncertain?

[Hogg J.A. then cited cases for the proposition that words in a covenant were to be read with "regard ... to the object which they were designed to accomplish" and "in an ordinary or popular and not in a legal and technical sense".]

In his very carefully prepared argument, one of the matters referred to by Mr. Morden was the fact that those who are responsible for the Dominion census ascertain, for the various territorial divisions of Canada, the population and the classification of that population, under various heads, including nationality and race. The information from which such classification is made is obtained through the inquiries made by census commissioners, enumerators or agents .... It would not be possible for those whose duty it is to obtain information in taking a census of the population to ascertain the precise degree or percentage of any race or blood in an individual. The classification must necessarily be made having regard to the word "race" in its ordinary and popular sense. If the language of cl. (f) of the covenant is regarded in its ordinary and popular sense, this clause cannot be said to be void for uncertainty because the exact degree of race or blood in any person among those set out in the aforesaid clause can not be ascertained .... For the reasons I have given, I think the appeal should be dismissed, with costs against the appellants.

NOTES

1) Following the Court of Appeal's decision in Re Noble and Wolf the Ontario legislature amended the Conveyancing and Law of Property Act by adding the following section [now s.22]:

"Every covenant made after the 24th day of March, 1950, that but for this section would be annexed to and run with land and that restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place or origin of any person is void and of no effect."

Consider precisely how this would affect the covenant in Re Noble and Wolf?

2) An appeal of the Ontario Court of Appeal decision was allowed by the Supreme Court of Canada, but principally on the ground that the covenant did not satisfy the requirements of an enforceable restrictive covenant: see Noble v. Alley, [1951] S.C.R. 64. (Note that we will deal with restrictive covenants later in the course). Four of the seven judges also stated, as an alternative ground of invalidity, that the covenant was uncertain.

teachers", etc. It would be hard to imagine in the foreseeable future that a charitable trust established to promote the education of women, aboriginal peoples, the physically or mentally handicapped, or other historically disadvantaged groups would be void as against public policy. Clearly, public trusts restricted to those in financial need would be permissible. Given the history and importance of bilingualism and multiculturalism in this country, restrictions on the basis of language would probably not be void as against public policy subject, of course, to an analysis of the context, purpose and effect of the restriction.

In this case the court must, as it does in so many areas of law, engage in a balancing process. Important as it is to permit individuals to dispose of their property as they see fit, it cannot be an absolute right. The law imposes restrictions on freedom of both contract and testamentary disposition. Under the Conveyancing and Law of Property Act, R.S.O. 1980, c. 90, s. 22, for instance, covenants that purport to restrict the sale, ownership, occupation or use of land because of, inter alia, race, creed or colour are void. Under the Human Rights Code, 1981, discriminatory contracts relating to leasing of accommodation are prohibited. With respect to testamentary dispositions, as mentioned earlier, one cannot establish a charitable trust unless it is for an exclusively charitable purpose .... Similarly, public trusts which discriminate on the basis of distinctions that are contrary to public policy must now be void.

A finding that a charitable trust is void as against public policy would not have the far-reaching effects on testamentary freedom which some have anticipated. This decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts. Historically, charitable trusts have received special protection: (1) they are treated favourably by taxation statutes; (2) they enjoy an extensive exemption from the rule against perpetuities; (3) they do not fail for lack of certainty of objects; (4) if the settlor does not set out sufficient directions, the court will supply them by designing a scheme; (5) courts may apply trust property cy-pres providing they can discern a general charitable intention. This preferential treatment is justified on the ground that charitable trusts are dedicated to the benefit of the community .... It is this public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination. Only where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void.

Appeal allowed.

NOTE

A number of Canadian cases have dealt with conditions and public policy. Consider whether the following would have been decided differently had the courts had the reasoning of the Ontario Court of Appeal in Re Canada Trust and Ontario Human Rights Commission before them?

A) In Re Rattray (1973), 38 D.L.R. (3d) 321 (Ont. H.C.), affd. (1974), 44 D.L.R. (3d) 533 (C.A.) approximately $1.7M was left to Queen's University to provide scholarships or bursaries. One of the conditions was that they should not be awarded "to any student who is a communist, socialist or a fellow traveller". On an application by the University the condition was struck down for uncertainty. The case generated some publicity and a letter writer to the Globe and Mail, 17 September 1973, said in part: "The university ... had no qualms about accepting the money on this basis. Now that ... Rattray is ... dead they apparently find it morally proper to alter his conditions, without the acceptance of which the

money would not have been given to them in the first place .... [H]is money will henceforth be made available to persons whose political philosophy he deplored, even though he took pains to develop the point that it should not. I believe this court's decision should be appealed, not only to safeguard the intents of the deceased person who has given so generously, but to safeguard the inviolability of trust funds in general and the intents that gave them birth".

On the issue of uncertainty, the letter writer agreed that there "is ... no precise definition" of terms like socialist, communist, or fellow traveller. But the problem could be dealt with by asking each student who applied to the fund: "can you in conscience subscribe to its intent in accepting this scholarship"?

B) In Re Hurshman (1956), 6 D.L.R. (2d) 615 (B.C.S.C.) the testator left property which his daughter would inherit "provided she is not at that time [the time when the will took effect] the wife of a Jew". This will was made a month after Mr. Hurshman's daughter married Ivan Mindlin, who all parties to the case agreed was by "lay definition" Jewish. McInnes J. held that the condition "is directly contrary to public policy" because "in order for the daughter to inherit she must divest herself of her husband".

C) Re Metcalfe (1972), 29 D.L.R. (3d) 60 (Ont. H.C.) involved a testator who provided for a scholarship fund in his will. McGill was to provide a scholarship for a male medical student unable to finance his own studies, who was a Protestant of good moral character, had received a high school education in Ontario, and had shown athletic ability. When the university was informed of this it disclaimed the gift, stating in a letter that "our Scholarship Committee ... will not recommend acceptance of discriminatory gifts such as this for 'a Protestant of good moral character, educated in Ontario and who possesses athletic ability' ".

Any recipient of property is entitled to disclaim, and that might have been the end of the matter. However, the testator's widow argued that the gift should stand as one given to charity, that McGill was only the selector of the recipient, not the recipient itself, and that the court should appoint another "selector". After construing the precise terms of the bequest the court held that McGill was really the recipient, and that the gift therefore failed.

CHAPTER FOUR

POSSESSION AND TITLE AT COMMON LAW - ADVERSE POSSESSION

A) INTRODUCTION

Since the common law maintains the fiction that the ultimate ownership of all real property lies in the Crown, no individual can "own" land. Instead, individuals have "title" to land, which can be defined as a right to all uses of real property. Nowadays title is invariably asserted through a document - a conveyance or a will. But historically possession was a very significant part of the law of title. First, in and of itself it provided a method of acquiring title to unoccupied lands; although that case dealt with property other than land, remember here the role played by possession in Pierson v. Post. At common law factual possession, including possession which has no obvious rightful origin, gave a title to the possessor. Second, possession also provided a method of proving title against other claimants, of reinforcing title. In the medieval period possession was called seisin, and seisin was "fact not right". It "expressed the organic element in the relationship between man and land and as such provided presumptive evidence of ownership": Gray, Elements of Land Law, p. 53. Possession, it is often said, was the root of title.

This initial description of title at common law would not be complete without also noting an important corollary of it - that title to land at common law is relative. It cannot be absolute because the Crown owns all land, and therefore it was, and is, pointless to ask a court to decide who owns the land. Instead, one asked the court - of the two disputants before you, who has the better title? This can be illustrated by a simple example. A sold land to B who never occupied it; C occupied the land as vacant land; C was then forcibly dispossessed by D. B, C, and D all have a title, but some titles are better than others. C could sue D for recovery of the land, and if C did so the court would not inquire into whether there was somebody out there with a better title than C. B must take an action on his or her own account. C may have had no "right" to occupy the land, but "a wrongful possessor will be able to defend his possession against trespassers and adverse claimants who have no better right": McNeil, Common Law Aboriginal Title, p. 15.

While it fulfills nothing like as important a role as it once did, possession remains important in the common law of title to real property. Conceptually in registry systems (more on which below), "modern conveyancing rests to some degree on the assumption that proof of continued de facto enjoyment of land by the vendor and his predecessors provides a good root of title for the purchaser": Gray, Elements of Land Law, p. 59. More importantly for current purposes, it remains possible to acquire title to land at common law, good against all the world, through long possession. One way in which this can be done is through the doctrine

of aboriginal title, dealt with extensively later in the course. But it can also be done through the law of adverse possession. Briefly, since the requirements for adverse possession are what the rest of this chapter is about, adverse possession means that uninterrupted enjoyment of land of the correct nature over a period of time stipulated by law can effectively give to the possessor a title to the land, a title better than all others.

B) RATIONALES FOR ADVERSE POSSESSION

T. W. Merrill, "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 Northwestern University Law Review 1122

The first justification is one that is commonly invoked in support of statutes of limitations generally - the difficulty of proving stale claims. As time passes, witnesses die, memories fade, and evidence gets lost or destroyed. The statute of limitations recognizes this problem by adopting a conclusive presumption against attempting to prove claims after a certain period of time has elapsed.

The concern about lost evidence is common-sensical. As the quality and quantity of evidentiary material deteriorates over time, the process of fact-gathering and proof becomes more difficult. Surrogate witnesses and documents generally are not as accessible or as reliable as originals; consequently, more resources must be expended in finding them and corroborating their veracity. A rule requiring prompt resolution of claims is thus efficient in that it helps to minimize the costs of litigation and trial. There is also a fairness concern underlying the lost evidence rationale. Requiring that disputes be resolved promptly prevents the plaintiff from unfairly surprising the defendant with a claim that may be difficult or impossible to refute because evidence that would allow the defendant to defeat the claim no longer exists.

To be sure, the lost evidence rationale probably carried greater force in the seventeenth century, when Parliament passed the first general statute limiting the right to recover possession of land, than it does today. In seventeenth-century England there were no recording acts, and surveys were probably expensive or unreliable, or both. In modern America, in contrast, all states have acts which provide for permanent public recordation of deeds to real property and which generally establish the primacy of the recorded deed over unrecorded interests. Furthermore, professional surveys now are widely available at relatively low cost. Yet even today, lost evidence related to the issue of title can be a problem. Recorded deeds may contain defects or omissions; the court house or title plant may burn down; surveying errors may have resulted in misplaced boundary markers....

A second concern which has frequently been advanced in the literature on adverse possession is the interest in "quieting titles" to property. This objective is related to, yet analytically distinct from, the problem of lost evidence. Imagine a state where lost evidence of title is never a problem - there is a universal recording system, accurate and indestructible boundary markers, and so forth. Nevertheless, if that state has no mechanism for eliminating old claims to property, the information costs, transaction costs, and hold out problems involved in discovering and securing the releases of these claims would very likely impose a significant impediment to the marketability of property. Title examiners would have to trace every deed back to its source; ancient easements, unextinguished spousal rights, grants of future interests, unreleased mortgages or liens could well be discovered; these interests would have to be traced to present-day successors; and releases of these interests would then have to be secured. If the buyer always purchased subject to such claims, no matter how old they might be, he would have to go through a complicated process of fact-gathering and negotiating in order to obtain clear title to the property. The "nuisance" value of these claims could easily lead to holding out or other rent-seeking behavior that would make the process of obtaining clear title even more burdensome.

was sometime much closer to the end of the 10-year period." This is a finding of fact and there is evidence to support it, most of which I have already referred to. It also supports his finding that the appellant's possession did not effectively exclude that of the respondents.

The two issues are intertwined. The finding that the appellant did not in fact exclude the respondents from possession makes it unnecessary to consider whether he had the intention of doing so and extremely difficult for him to prove that he did. In most cases, it is to be expected that the intention to exclude the true owner will be evidenced by acts which effectively exclude the owner's possession. No such inferences can be drawn in this case.

The appellant's occupancy of the land was not justified by any suggestion of colour of right or mistake as to title or boundaries. Occupation under colour of right or mistake might justify an inference that the trespasser occupied the lands with the intention of excluding all others which would, of course, include the true owners. Such was not the case in this instance.

The acts of possession and the intention to possess are not mutually reinforcing in this case where the learned trial judge made such clear-cut findings against the appellant on both issues. There being abundant evidence to support his findings and no error in his application of the governing principles of law to them, it is not open to this Court to challenge or review them....

For the foregoing reasons, I would, therefore, dismiss the appeal with costs.

[Leave to appeal this decision to the Supreme Court of Canada was refused: (1984), 27 A.C.W.S. (2d) 412.]

E) NOTES

The Doctrine of Colour of Title. An adverse possessor will normally gain title only to the land occupied, not to other land covered by the real owner's title. However, if a person enters land under a defective title, and adversely possesses only part of the land for the requisite period, he or she will be considered to have been in constructive possession of the whole. See Wood v. Leblanc (1904), 34 S.C.R. 627 per Davies J. at 644:

"the possession necessary under a colourable title to oust the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed but only when and while there is that part occupation."

Possessory Title and Appurtenant Rights. The successful adverse possessor acquires only the land itself and not any rights appurtenant to it. The leading case is Wilkes v. Greenway (1890), 6 T.L.R. 449 (C.A.). Greenway had acquired land previously belonging to Wilkes by adverse possession, but needed to use a private road belonging to Wilkes in order to reach that land. He argued that he had also acquired an easement of necessity consisting of a right of way via the road. (We will deal with easements in a later chapter). The Court rejected Greenway's argument, noting that "there is nothing in the Statute of Limitations to create ways of

necessity. The statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot impart into such negative provisions doctrines of implication [of easements of necessity]".

Adverse Possession and Systems of Recording Title. It was noted in the introduction to St Clair Beach that there are two systems of recording title to land in common law Canada. It is not difficult to see that adverse possession is incompatible with the policy of a Land Titles system. As Williams, Limitation of Actions in Canada, explains:

"The institution of acquisition of land by long possession is designed to enable the general public to rely upon the status quo. It invests the apparent relation of various persons to land with an authority that they would not otherwise have. On the other hand the Torrens system of registration of land has the aim of ensuring that reliance on the register will be well-founded. It enables reliance on the legal formality of registration. Therefore, whereas the institution of acquisition of title by adverse possession encourages reliance on the state of facts relating to the land, the system of registration of title encourages reliance upon a legal construction."

The result is that all land titles statutes, except that of Alberta, declare the Land Titles system to be paramount to the Limitations Act: see, for example, Land Titles Act, R.S.O. 1980, c. 230, s. 54 (1). The position in Alberta is explained in Williams, Limitation of Actions in Canada:

"Alberta's legislation was essentially equivocal on the matter of which statute should govern. The choice of the other provinces in this respect was not adopted in Alberta. In Alberta a long line of decisions concluded that the Torrens system was subject to the exception of allowing the adverse possessor to be registered as the estate holder at the expiry of the limitation period. Alterations in the Land Titles Act have subsequently been made so as to entrench the dominance of the Limitation of Actions Act. The mechanics of the Alberta system are that the plaintiff adverse possessor must obtain a declaratory judgment recognizing his title and after a lapse of three months, if no appeal is launched, the Registrar is empowered and bound to register the adverse possessor as an estate owner."

CHAPTER FIVE

CONCURRENT OWNERSHIP

(A) INTRODUCTION

We have seen that the common law permits "shared" ownership where ownership is divided by time - for example, the life tenancy and the reversion in fee simple. It also permits two or more persons to own property and to have simultaneous rights in it. When this happens they are said to hold jointly, to be co-owners, or to have concurrent interests in the property. Any estate known to the law, and all types of property, can be the subject of co-ownership.

To complicate matters, there is more than one form of coownership. Read the following note on the two forms that are today the most important.

Cheshire's Modern Law of Real Property

There are four possible forms of co-ownership, one of which, tenancy by entireties, is now defunct; while another, coparcenary, seldom arises. The two found in practice are joint tenancy and tenancy in common.

A joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares, or, to use technical language, without words of severance. If an estate is given, for instance, to A and B in fee simple, without the addition of any restrictive, exclusive or explanatory words, the law feels bound to give effect to the whole of the grant, and this it can do only by creating an equal estate in them both. From the point of view of their interest in the land they are united in every respect.

But if the grant contains words of severance showing an intention that A and B are to take separate and distinct interests, as for instance where there is a grant to A and B equally, the result is the creation not of a joint tenancy, but of a tenancy in common.

The two essential attributes of joint tenancy which must be kept in mind ... are the absolute unity which exists between joint tenants, and the right of survivorship.

There is, to use the language of Blackstone, a thorough and intimate union between joint tenants. Together they form one person. This unity is fourfold, consisting of unity of title, time, interest and possession. All the titles are derived from the same grant and become vested at the same time; all the interests are identical in size; and there is unity of possession, since each tenant totum tenet et nihil tenet. Each holds the whole in the sense that in conjunction with his co-tenants he is entitled to present possession and enjoyment of the whole; yet he holds nothing in the sense that he is not entitled to the exclusive possession of any individual part of the whole. Unity of possession is a feature of all forms of co-ownership.

For this reason one joint tenant cannot, as a general rule, maintain an action of trespass against the other or others, but can do so only if the act complained of amounts either to an actual ouster, or to a destruction of the subject matter of the tenancy.

NOTES

1) Burgess v. Rawnsley was referred to with approval in Robichaud v. Watson (1983), 42 O.R. (2d) 38 (H.C.). In that case Mr. Robichaud and Ms. Watson purchased a house as joint tenants and lived in it from 1971 to 1974. They went on a vacation to England in 1974, where Watson announced that she would not return. Robichaud returned and lived in the house alone, paying all expenses. In 1975 there were unsuccessful negotiations between their solicitors for the sale of Watson's equity. Robichaud died in 1979, and Watson argued that the joint tenancy had still existed at his death. The Court rejected this, and per the third rule in Williams v. Hensman found that the separation, the negotiations, and the fact that Robichaud alone was responsible for the house all demonstrated that the parties regarded themselves as tenants in common.

2) K and T were married in 1971 and bought a house as joint tenants. In 1987 they separated, K moving out. In 1988 K made an application under the provincial matrimonial property legislation in which she stated that there was no reasonable prospect of reconciliation between the parties and in which she asked for a division of family assets. K and T also carried out negotiations for settling their affairs; these negotiations included, but were by no means limited to, sale of the house and division of the proceeds. They were not concluded. In April 1988 T made a will leaving his estate to his new partner. In September 1988, with no agreement having been reached between him and K, T died. Who should be entitled to T's share of the house?

3) In Schobelt v. Barber (1966), 60 D.L.R. (2d) 519 (Ont. H.C.) William Barber murdered his wife Marjorie Barber, with whom he had been a joint tenant. Her sister sued to prevent William inheriting by survivorship. She argued that it was "contrary to public policy that the defendant should be able to deal with this parcel of real estate as his own because of the death of his wife at his own hand." In the words of Moorhouse, J., the defendant's argument was that while "no one shall gain a right by his own wrong, ... if he has a right he shall not lose it because of a wrong done by him in connection with it." Moorhouse J. referred to statutory and common law doctrines that prevented murderers from taking benefits under insurance policies or wills in similar circumstances, and noted that the issue of benefit by survivorship had not been resolved.

While the judge did not find it difficult to state that public policy should prevent Barber from benefitting from his act, he had more difficulty in deciding how this should be done. He did not wish to simply declare "the jus accrescendi ... inoperative" because this "would ... deprive the survivor of a right he acquired on the creation of the joint tenancy" and would "impos[e] a further penalty on the survivor who has been sentenced for the crime of which he has already been convicted." Nor did he adopt a suggestion that the murderer be deemed to have pre-deceased his victim; this "could only be accomplished by legislation" [or perhaps by God]. Moorhouse J. decided to allow the right of survivorship to operate, so that Barber was sole

owner at common law, and then to "impress [the property] with a trust and declare he then holds an interest as constructive trustee for the victim's heirs or devisees." Those heirs therefore received a half interest as beneficiaries of the trust, with Barber having the other half.

(D) RELATIONS BETWEEN CO-OWNERS

The material in this section, and in the subsequent one on partition or sale, applies equally to joint tenants as to tenants in common.

The underlying principle in the law's treatment of the relations between co-owners is that the owners should work out their problems themselves; the courts will not "police" the relationship. At common law there were only two actions that could be taken by one co-owner against another. First, an action for waste was available if one co-owner damaged the land. The courts were, and are, more restrictive in allowing actions for waste in this area than when ordering the relations between a life tenant and the holder of the remainder interest. This is because co-tenants have equal rights of occupation and use. Injunctions against waste will be granted only where the waste is malicious, or destructive, or attended by peculiar circumstances; there is no action for waste if the land use is reasonable. Second, if one co-owner seeks to exclude the other from the land, the action of ouster was available. This responds to the rule that no co-owner can exclude the others from possession or enjoyment of the whole or part of the land. However, mere sole possession or appropriation of the entire proceeds does not amount to an ouster, which requires denial of the co-owner's rights.

An action for account (an action where one party claims that another must pay him or her money) is also available by statute, but in very limited circumstances, as explained in the following cases.

REID v. REID (1978), 87 D.L.R. (3d) 370 (Sask. Q.B.)

MACDONALD, J.: In 1928 the father of the plaintiff and defendant died. They continued to live with the mother on [a farm] ... near the Town of Balcarres in the Province of Saskatchewan. The parties' father died intestate so the property went one-third to the mother and each of the sons. They all remained on the farm until 1939 when the plaintiff moved to Flin Flon in the Province of Manitoba where he worked in the mines. He remained at Flin Flon. He retired, and is now 67 years of age. He has had serious medical problems.

The defendant remained on the farm with his family. His mother had mortgaged the farm for $4,000 in 1928. The defendant paid off the mortgage by 1949. The mother died in 1959. At the time of her death there was approximately $1,1OO in taxes owing on the land. The mother left a will in which she left her interest in the NW 1/4 to Douglas and she left her interest in the SW 1/4 to Laurence....

CHAPTER SIX

EASEMENTS

A) INTRODUCTION

An easement is one of the class of rights in land known as "incorporeal hereditaments", or sometimes as "servitudes". It is essentially the right of one landowner to go onto the land of another and make some limited use of it. It is not a "natural right", it does not come with the fee simple, and must therefore be created as part of the relationship between the two landowners. There are many types of easements, in the sense that there are many different kinds of things which can be the subject of an easement. There is also more than one way to create an easement. Perhaps the most common kind of easement is the right of way created by express agreement of the parties, and I will use that paradigmatic situation as an illustration

Imagine that A owns land bordered on three sides by woods, and on one side by a road. A wishes to sell part of the land, and B wishes to buy part of it. But A wants to sell a part that does not border on the road. B is not going to buy if getting to the grocery store entails, at best, hacking a path through the woods - assuming that B has a right to go through the woods. If not, a helicopter will be required. The solution is simple - as part of the agreement by which she buys the land from A, B also obtains the right to cross A's land to get to the road. Presumably A will extract some price for this, some increase in B's purchase price, but it matters not to the law whether payment is given, only that the agreement has been made.

If an easement has been created by one of the methods acceptable to the law (an issue dealt with in sections (c) and (d) of this chapter), and if the right granted meets the necessary test as being the kind of thing allowed by the law of easements (an issue discussed immediately below in section (b)), then it will generally run with the land, be a part of title. That is, if the easement is created during the period that A and B own the two pieces of land, and A then sells to C and B sells to D, C and D are in the same position as landowners as A and B were. This is what makes the easement a property right, for the original agreement between A and B could be enforced merely as a contract, as could any other agreement between them. But if the particular right created by the initial contract is an easement, it becomes part of the title, part of the fee simple that each successor owner has, it has an existence independent of the identity of the owner of the land at any given time.

NOTES

1) Re Lonegren et al and Rueben et al (1988), 50 D.L.R. (4th) 431 (B.C.C.A.) concerned the requirement that there be a dominant and servient tenement. At the time of the creation of the easement one tenement was owned by Mr and Mrs Reuben as joint tenants, the other by Mr Reuben and another person as tenants in common. Successors-in-title to the servient tenement argued, unsuccessfully, that this was tantamount to there not being different owners of the two tenements. The trial judge had held that ownership was sufficiently separate, and the Court of Appeal agreed, although without reasons.

2) In Ellenborough Park the court asks whether the easement is "inconsistent with the proprietorship or possession of the alleged servient owners". What policy considerations inform this part of the test for an easement?

3) A owns a piece of waste ground, and agrees to sell half to Wal-Mart. Wal-Mart intends to use the land for a new store, and makes an agreement with A for the use of A's retained part of the waste ground as a parking lot. Over the next couple of years about 100 cars a day are parked on A's land, the parked cars using about half of the area. A then sells to C, who tells Wal-Mart it cannot use the parking lot any longer. Wal-Mart claims it has an easement for parking. What arguments would you use on C's behalf?

POSITIVE AND NEGATIVE EASEMENTS

A great number of rights have been recognised by the courts as valid easements. A selection includes the right to tunnel under land, to maintain power lines and towers, to discharge water onto somebody else's land, to have drainage pipes and sewers underground, to string a clothes line, to use a church pew, and, my personal favourite, to use a neighbour's washroom. The list of possible easements is by no means closed, despite some judicial pronouncements hinting at that in the early part of this century, a point established in Re Ellenborough Park.

However, it should be noted that the numerous examples given here are all of what are termed "positive easements". That is, they involve A's right to do something on B's land. But there are also a few negative easements recognised - easements which give A the right to prevent B doing something with his or her land. Those known to the law are:

- the right to light
- the right to air by a defined channel
- the right to lateral support for buildings
- the right to continue to receive the flow of water from an artificial stream

CHAPTER SEVEN

RESTRICTIVE COVENANTS

A) INTRODUCTION

Restrictive covenants are, like easements, a form of incorporeal hereditament. Begin with the notion that a covenant is an agreement under seal, one contained in a deed. In the context of real property law, it is an agreement by which one person agrees to do something, or not to do something, with his or her land, for the benefit of the other party. As with an easement created by express grant, we can use contract law to say that the terms of the covenant are enforceable as between the original parties. But, again similarly to an easement, the issue is when the terms of the covenant become attached to the land, as part of title to it, and are therefore enforceable by and against successors in title to the original contracting parties. That is, at what point will the law consider the covenant to be an interest in land.

An obvious question which will occur to you at this point is - what is the difference between covenants and easements? We are not going to answer this fully at the moment, because the entire answer requires us to understand the whole chapter. But for the present you can usefully think of a covenant as (a) requiring an owner to do something or not do something with his or her own land, whereas an easement gives its holder the right to go onto another's land, and (b) as an agreement containing terms and conditions that would not amount to an easement by the characteristics outlined in Ellenborough Park or because of the restrictions on negative easements noted in Phipps v. Pears. There are other differences, but the point is that covenants principally affect servient land, while easements only do so inferentially, and that covenants are potentially much wider in scope than easements - although there are limits on which type of covenants can go with title. We will see that covenants are much more difficult to enforce against successors-in-title than easements, and thus you would never attempt to argue that something like a right of way was a covenant.
A paradigm restrictive covenant (that's a term of art which will be explained later) would be a limit on the kind of development that one land owner could undertake. That is, you own land and sell half of it off. You know the purchaser is a yuppie stockbroker who would want to build a large, ugly house and paint it pink. You insert a clause in the conveyance that would prevent this. Restrictive covenants are therefore a form of private zoning. Despite the introduction of public zoning they remain part of the law and are widely used. There is some debate over their acceptability. They have been used in the past to enforce racial segregation - refer back to Re Noble and Wolf - and generally, as one author puts it, they "can serve a variety of venal interests" and "are the willing ally of the 'nimby' " Ziff, Principles of Property Law, p.304.

At this stage we need to introduce some terms. The covenantor, the person who agrees to do

something or not to do something, has what is called the burden of the covenant. The covenantee, the person for whose benefit the covenant is made, has what is called the benefit of the covenant. Enforcing the burden and being able to enforce the benefit against or for a successor in title to the original party is known as running the burden or the benefit of the covenant.

Let us now return to the situation with which we began - two persons make a covenant related to land which is enforceable between the original parties. When will it be enforceable for and against successors-in-title? This question brings a rather complicated answer, for the rules on running covenants are "unnecessarily complex and occasionally illogical": Ontario Law Reform Commission, Report on Covenants Affecting Freehold Land, 1989, p. 1. The first part of an answer to the question involves making a distinction between the benefit and the burden.

B) COVENANTS GENERALLY: RUNNING THE BENEFIT AT COMMON LAW

The general rule at common law is that the burden of a covenant will not be run in any circumstances: see Austerberry v. Oldham below. The covenantee would still have an action in contract against the original covenantor, but this would be useless once that person had conveyed the land to another.

The common law, however, will allow the benefit to run in certain circumstances. In other words successors in title to the covenantee can enforce a covenant against the original covenantor, but not against the latter's successors.

There are three conditions which must be met before the common law will even allow the benefit to run. They are:

1) The original covenantee must have had the legal estate in the land which is to be benefitted.

2) The successor in title to the original covenantee must obtain the same legal estate as the original covenantee, and the benefit must have been intended to run with the land, not to have been a mere personal covenant.

3) The covenant "must touch and concern the dominant land" (the land to be benefitted). This is what the Austerberry case is principally about.

the land held by the Defendants; because, if the covenant does run at law, then the Plaintiff, so far as I can see, would be right as to this portion of his claim. Now, as regards the benefit running with the Plaintiff's land, the covenant is, so far as the road goes, a covenant to repair the road; what I mean by that is, there is nothing in the deed which points particularly to that portion of the road which abuts upon or fronts the Plaintiff's land - it is a covenant to repair the whole of the road, no distinction being made between the portion of that road which joins or abuts upon his land and the rest of the road; in other words, it is a covenant simply to make and maintain this road as a public highway; there is no covenant to do anything whatever on the Plaintiff's land, and there is nothing pointing to the Plaintiff's land in particular. Now it appears to me to be going a long way to say that the benefit of that covenant runs with the Plaintiff's land. I do not overlook the fact that the Plaintiff as a frontager has certain rights of getting on to the road; and if this covenant had been so worded as to shew that there had been an intention to grant him some particular benefit in respect of that particular part of his land, possibly we might have said that the benefit of the covenant did run with this land; but when you look at the covenant it is a mere covenant with him, as with all adjoining owners, to make this road, a small portion of which only abuts on his land, and there is nothing specially relating to his land at all. I cannot see myself how any benefit of this covenant runs with his land.

FRY, L.J.: I have very little to do in this case except to express my assent and concurrence with the conclusion of my learned brothers .... Upon the second point I have not much to add. It appears to me that the questions are three. In the first place, did the benefit of this covenant run with the land - the land of Mr. Elliott? Upon that point my opinion is perhaps not quite as confident as that of my learned brothers. I am rather more inclined to think that the road connecting the land with the public highway was so far an incident to the use and occupation of the remainder of Mr. Elliott's land that it might be conceivable that it came within the principles of covenants relating to things incident to the land; but, at the same time, I do not desire to express any difference of opinion upon that. But upon the point whether the burden of the covenant ran with the land of the covenantors, I am clearly of opinion that it did not so run; and I share the doubt which has been expressed by my learned brothers whether in any case, except that of landlord and tenant, the burden of covenants of this description does ever run with the land.

NOTES

1) We will return to the question of whether or not the burden of the covenant should run at common law later in this chapter. It is necessary to first understand when and why the burden of the covenant will run in equity before doing this.

2) You might have some doubt as to correctness of the decision in Austerberry that the covenant there did not touch and concern the land. The meaning of this term is not easy to grasp. The leading definition is from Rogers v. Hosegood [1900] 2 Ch. 388: "the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land". That is, the covenant must relate to the use which may be made of the servient land and such limitation on use or requirement of particular use must affect the dominant land as land as land, must not be personal. We will return to the meaning of "touch and concern the land" later in this chapter.

3) In Smith et al v. River Douglas Catchment Board, [1949] 2 K.B. 500 (C.A.) various landowners agreed to contribute towards riverbank work if the Board agreed to maintain the banks afterwards. When the bank later burst successors in title to the original landowners sued on the covenant. The court held that the benefit of the covenant could run since it touched and concerned the land. You should note that in this case the Board had no land of its own, and take from that the point that the requirements for running the benefit do not include a requirement that there be a dominant and servient tenement. As we will see, this is a requirement for running the burden in equity.

C) RESTRICTIVE COVENANTS: RUNNING THE BURDEN IN EQUITY

We have seen that the common law rule is that the burden of a covenant will not run. But equity will run the burden in certain circumstances. This is where the term of art "restrictive covenants" comes in. A restrictive covenant can be defined as a covenant that equity will enforce against successors in title to the original covenantor.

The rules on running the burden of covenants in equity are complicated, and that complexity is exacerbated by the fact that there are also requirements for running the benefit in equity. In addition, you will not find complete agreement among either judges or scholars on how best to organise all of the rules. What follows is our view of how best to do this.

There are four principal requirements to be met before equity will run the burden of a covenant, as follows:

1) The covenant must be negative in substance; hence the term "restrictive" covenant. It may be positive in form, as the covenant is in Tulk v. Moxhay: "keep and maintain the said piece of ground ... in an open state, uncovered with any buildings". But this is negative in substance - it is a prohibition on development.

2) There must be a dominant and servient tenement.

3) The covenant must touch and concern the land of the covenantee.

4) Successors-in-title to the covenantor must have notice of the covenant.

The first case in this section, Tulk v. Moxhay, is considered to be the origin of the rule that equity will run the burden of some covenants. Ask yourself what the basis of the decision is in Tulk, and which of these requirements it appears to lay down?

(1848), 2 Ph. 774, 41 E.R. 1143. The doctrine of notice was the decisive factor in that case. The presently developed theory of enforceability is that expressed by Rand, J., in Noble & Wolf v. Alley, [1951], 1 D.L.R. 321 at p. 326, S.C.R. 64 at p. 69:

"Covenants enforceable under the rule of Tulk v. Moxhay ... are properly conceived as running with the land in equity and, by reason of their enforceability, as constituting an equitable servitude or burden on the servient land. The essence of such an incident is that it should touch or concern the land as contradistinguished from a collateral effect. In that sense, it is a relation between parcels, annexed to them and, subject to the equitable rule of notice, passing with them both as to benefit and burden in transmissions by operation of law as well as by act of the parties.'

Assuming for the moment that there has been an annexation of this covenant to some land of the club capable of being benefited at the time of the conveyance to Mrs. Firth, does this covenant relating to occupation of the servient land touch or concern the dominant land, for it is that land which must be "touched or concerned"? There is no privity of contract between Galbraith, as owner of the restricted land, and the club. The club has parted with the fee simple. If the club is to enforce the covenant against Galbraith, it must be done for the benefit of land retained by the club at the date of the covenant. It is this protected land which must be touched and concerned by the covenant, within the classic definition of Farwell, J., in Rogers v. Hosegood, at p. 395: "the covenant must either affect the land as regards mode of occupation or it must be such as per se, and not merely from collateral circumstances, affects the value of the land."

The covenant in question here gives the club the right to choose the persons who shall occupy the servient land, if the owner wishes to go outside the club membership. This has nothing to do with the use to which the land may be put, but relates only to the kind of person who may be given occupation. It is imposed by the vendor for its own benefit as a club. It does not touch or concern the land, as being imposed for the benefit of or to enhance the value of land retained by the club. It calls into being the exercise of an unfettered personal discretion by the club management and its plain purpose is to preserve the amenities of the club. That such a covenant does not touch or concern the dominant land is concluded in this Court by the decision in Noble & Wolf v. Alley, supra. The covenant in that case covered occupation as well as alienation .... It was held that this was not a covenant touching or concerning the land and I can see no possible ground for any distinction between a covenant restricting alienation and one restricting occupation.

NOTES

1) Galbraith tells us that a restriction on who may buy the servient land does not relate to the dominant land as land, it was personal. Austerberry v. Oldham, above, held that a covenant to repair a road was for public benefit, and does not touch and concern the land of particular landowners. In Zetland v. Driver [1939] Ch 1 (C.A.) the covenant was to the effect that no alcohol be sold on the servient land and that "no act or thing shall be done or permitted which in the opinion of the vendor [dominant tenement owner] would be a public or private nuisance or prejudicial or detrimental to the vendor or owners or occupiers of any adjoining property or to the neighbourhood". The servient tenement owner argued that this did not touch and concern because it was made not only for the dominant tenement but also for the neighbourhood as a whole. Farwell J. rejected this contention, holding that "the paramount purpose" of the covenant "is to benefit and protect the unsold land of the vendor.... [n]othing which would be a nuisance or annoyance to an adjoining owner of the neighbourhood is within the covenant, unless it is also injurious to the unsold land of the vendor".

2) The most common form of restrictive covenant is a limitation on development, and therefore one can assume that such a covenant touches and concerns the land. But how much land? In Earl of Leicester v. Wells-next-the-Sea Urban District Council [1973] 1 Ch 110 the court accepted that restrictions on a 19-acre plot could benefit a 32,000 acre estate. In Re Ballard's Conveyance [1937] Ch 473 building restrictions on an 18-acre plot were held not to be enforceable in favour of an estate of 1,700 acres. The court stated: "it appears to me quite obvious that while a breach of the stipulations might possibly affect a portion of that area in the vicinity of the applicant's land, the largest part of this area of 1,700 acres could not possibly be affected by any breach of any of the stipulations".

3) In Jain v. Nepean (1989), 69 O.R. (2d) 353 (H.C.J.) a municipality sold lots in an industrial park. Wishing to encourage development and not speculation, it inserted covenants requiring the purchasers to build by a certain date, which were said to be for the benefit of other lands of the municipality. They were held to be positive covenants, but in addition it was said that they did not touch and concern any land retained by the municipality, but benefitted the municaplity qua municipality. They were an adjunct to municipal development policy.